Supreme Court, U.S.
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No. 93-660

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

STEVEN L. HIRSH,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari
To the Superior Court of Pennsylvania

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

STEVEN L. HIRSH has petitioned this Court for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania, Pet. Appx. B, as to which allowance of appeal was denied by the Pennsylvania Supreme Court, Pet. Appx. A, affirming his conviction and sentence on several counts of Medicaid fraud. The respondent's brief in opposition ("BO") seeks to imply that he did not preserve his federal issue, and that the challenged jury instruction in this case is entirely conventional. Neither objection to the petition has merit.

1. The petitioner did not fail to preserve his federal question.

The BO implies, without arguing, that petitioner somehow failed to preserve properly the federal issue presented in this petition. BO at 5-6. The state cases that petitioner cited in the Superior Court, however, all purport to apply the federal standard for proof beyond a reasonable doubt. The state cases also recognize and claim to follow (as respondent admits) this Court's precedent on the standard for effective assistance of counsel. Nor does respondent dispute that the constitutional issue was also raised in the Petition for Allowance of Appeal to the state Supreme Court and in a letter citing Sullivan v. Louisiana, 508 U.S. --, 124 L.Ed.2d 182 (June 1, 1993), as supplemental authority. The issue presented in the

petition ha[illegible]ot been waived. See Rule 14.1(h).

2. The instruction in this case which told the jury, after explaining "reasonable doubt," to "keep this standard of reasonable doubt in proper perspective" and not to apply the rule "to the exclusion of common sense" cannot be equated with an instruction defining a reasonable doubt, in part, as one "based on reason and common sense."

A comparison of the full jury charge on reasonable doubt and related subjects, as quoted in the BO at 7-9, with the summary given in the Petition at 16-17 & n.7, will show that the Petition does in fact quote all of the pertinent language of the lower court's charge to the jury, and does not take the challenged portion out of context. Compare BO 7.

The BO does not even cite, much less discuss or distinguish, this Court's recent cases in Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam), and

Sullivan, supra, on which the petition principally relies. Nor does the respondent seek to defend the judgment on the basis given in the lower court's opinion (not even in the alternative).[1] Instead, the BO asserts that it is proper for a judge to tell the jury, after presenting a proper explanation of the reasonable doubt rule, to "keep this standard of reasonable doubt in proper perspective," apparently by balancing "the legal rights of the accused" against a standard of "common sense." The respondent would justify this charge by equating it with standard instructions that define a

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1. The court below upheld the challenged jury charge as no different from instructions which inform the jury that proof beyond a reasonable doubt is not necessarily proof to a mathematical certainty or "beyond a moral certainty." App. B5. By ignoring this rationale, respondent apparently concedes petitioner's analysis that there is no similarity between the two.

"reasonable doubt," in part, as one "based on reason and common sense." If such an instruction had been given here, petitioner would have no complaint. But the challenged instructions in this case are almost the opposite of those standard instructions.

The standard instructions to which the respondent points tell that the jury, inter alia, that a doubt is "reasonable" if it is based on "reason and common sense." See also, e.g., Commonwealth v. Stokes, 532 Pa. 242, 615 A.2d 704, 709-10 (1992) (op. ann. jmt., viewing that phrase as part of "model charge"). These instructions tell the jury that application of the reasonable doubt rule incorporates and embraces the jury's reliance on its members' own common sense as to what sort of doubt is "reasonable." In the present case, the court properly

informed the jury that a reasonable doubt is an "honest doubt arising out of the evidence itself" and that it is "the kind of doubt that would restrain a reasonable man or woman from acting in a matter of importance to him or herself." The challenged charge then went on, however, to "add" the suggestion that the jury "give some thought about this phrase in our system of jurisprudence." Sup.Ct. Rep.Rec. 310; N.T. 334.

It was then that the judge told the jury to "keep this standard of reasonable doubt in proper perspective," stating:

> While you are sworn to protect the legal rights of the accused you should not apply the reasonable doubt standard to the exclusion of common sense, nor should the emphasis placed on reasonable doubt in our system suggest that you accept arguments concerning reasonable doubt that are not properly supported by the evidence.

Id. The plain meaning of this final admonition, which concluded the entire section of the charge on burden of proof, reasonable doubt, and the presumption of innocence, is that "common sense" is different from and in some tension with, if not actually in opposition to, "the legal rights of the accused" and "the reasonable doubt standard."[2] This final instruction therefore created a substantial risk that the jury might reach "a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage v. Louisiana, supra.

The judge in a criminal case must never invite the jurors, as the trial

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2. The last phrase -- being limiting to arguments "concerning reasonable doubt" rather than referring to all the arguments of both counsel -- also cautioned the jury unfairly against being swayed by defense counsel's closing.

court did here, to cast aside the reasonable doubt rule if it does not conform to their idea of "common sense." This Court should grant the petition and summarily reverse, ordering the Pennsylvania courts to allow a new trial.

CONCLUSION

For the foregoing reasons and those given in the Petition, petitioner STEVEN L. HIRSH prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum of the Superior Court of Pennsylvania affirming his convictions.

Respectfully submitted,

PETER GOLDBERGER
Attorney for Petitioner

December 13, 1993.